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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN A. JUDD,

Petitioner-Appellant,

v.

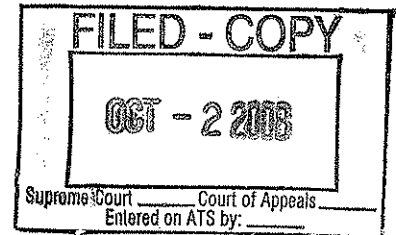
STATE OF IDAHO,

Respondent.

NO. 34408

APPELLANT'S BRIEF

BRIEF OF APPELLANT



APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BANNOCK

HONORABLE PETER D. MCDERMOTT
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

HEATHER M. CARLSON
Deputy State Appellate Public Defender
I.S.B. # 7148
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEYS FOR
PETITIONER-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

John A. Judd appeals from the district court's Order issued July 2, 2008, dismissing his Petition for Post-Conviction Relief. In this Order, the district court dismissed Mr. Judd's post-conviction petition and denied his Motion and Affidavit in Support for Appointment of Counsel at the same time. Mr. Judd contends the district court erred when it failed to rule on his motion to appoint counsel prior to dismissing his petition.

Statement of the Facts and Course of Proceedings

In 1998, Mr. Judd pled guilty to sexual abuse of a minor child under sixteen, and was sentenced to fifteen years, with five years fixed. (R., pp.5-7.) In April 2001, a Motion for Correction or Reduction of Sentence Pursuant to I.C.R. 35 was filed and was denied as untimely. (R., pp.8-9.) In March 2007, Mr. Judd filed a *pro se* Petition and Affidavit for Post-Conviction Relief, arguing that his counsel was ineffective for the following reasons:

1. failing to advise the court that the petitioner was a juvenile at the time of the offense;
2. failing to appeal the conviction so that the client could raise an excessive sentence claim;
3. failing to file a Rule 35, and
4. failing to advise the court of a conflict of interest arising from the fact that the court had also sentenced the petitioner's father in an unrelated case.

(R., pp.10-16.) Mr. Judd asked for a new trial in front of a new judge and that the court take judicial notice of the twenty one programs and classes Mr. Judd completed over

the last seven and one-half years while incarcerated. (R., p.12.) Mr. Judd attached an affidavit explaining that he was only seventeen years old when the alleged crime was committed; therefore, he “was not an adult and not bound to [the] adult courts that he was sentenced under.” (R., p.15.) He also noted that his trial counsel failed to advise the court of Mr. Judd’s age status, failed to advise the court of a conflict between his case and his father’s case, and failed to file an appeal or Rule 35 motion pursuant to Mr. Judd’s request after stating the motion was in progress. (R., p.15.) Mr. Judd explained he was not advised of these failures until he met with a local contract attorney in January 2007, which is why his petition was not filed earlier. (R., p.15.) Mr. Judd also stated that he “has done a great deal of programs during his incarceration” and listed several programs he had completed. (R., pp.15-16.) A Motion and Affidavit in Support for Appointment of Counsel was filed with Mr. Judd’s petition. (R., pp.23-26.)

The district court subsequently issued an Order dismissing Mr. Judd’s petition stating the petition was untimely without ruling on Mr. Judd’s motion to appoint counsel. (R., pp.28-29.) Mr. Judd filed a timely Notice of Appeal from the district court’s Order dismissing his petition. (R., pp.30-33.) Mr. Judd filed a Motion and Affidavit in Support for Appointment of Counsel with his Notice of Appeal and the State Appellate Public Defender’s Office was appointed to represent Mr. Judd on appeal. (R., pp.39-42.)

A Motion for Remand with Statement in Support and Motion to Stay Briefing Schedule was subsequently filed by the State. The Idaho Supreme Court granted the State’s motion and remanded the case to the district court to give proper notice of its intent to dismiss. (Order Granting Motion for Remand and Motion to Stay Briefing Schedule.)

On April 7, 2008, the district court issued a Notice of Intent to Dismiss giving notice of its intent to summarily dismiss Mr. Judd's petition because it was untimely. (Augmentation: Notice of Intent to Dismiss.)¹ Again the district court did not address Mr. Judd's previous motion for appointment of counsel. (See Augmentation: Notice of Intent to Dismiss.) On May 5, 2008, after no response was received by Mr. Judd, the district court dismissed Mr. Judd's petition, noting at the hearing, with only the State present, that "the Court didn't appoint an attorney for him" but had sent a Notice of Intent to Dismiss to Mr. Judd on April 7, 2008. (Tr.5/5/08, p.8, Ls.7-9; Augmentation: Minute Entry and Order dated May 5, 2008.) No order was issued on Mr. Judd's motion to appoint counsel. (Tr.5/5/08, p.8, Ls.7-9; Augmentation: Minute Entry and Order dated May 5, 2008.)

The district court subsequently received a motion to extend response time frame from Mr. Judd dated May 1, 2008, stating Mr. Judd was unable to respond in the initial time frame because he was transferred to Oklahoma and did not have access to his property or any legal material for over ten days. (Augmentation: Order dated June 4, 2008; Motion to Extend Response Time Frame.) He also noted that his legal mail was confiscated when he was moved and had not been returned and now that his case had been remanded to district court he did not have access to counsel. (Augmentation: Motion to Extend Response Time Frame.) The district court vacated its dismissal and

¹ A Motion to Augment the record with copies of the Motion to Extend Response Time Frame, Order dated June 4, 2008, Motion and Affidavit in Support for Appointment of Counsel, and Response to Notice to Dismiss was filed with this Brief. Additionally, an Order augmenting the Notice of Intent to Dismiss filed April 9, 2008 and Minute Entry and Order filed May 5, 2008 was issued by the Idaho Supreme Court on July 14, 2008, and an Order augmenting the Order filed July 2, 2008, dismissing Mr. Judd's post-conviction petition was issued by the Idaho Supreme Court on August 14, 2008.

issued an order extending Mr. Judd's time to respond to its Notice of Intent to Dismiss until July 8, 2008. (Augmentation: Order dated June 4, 2008.) Again, Mr. Judd's motion for appointment of counsel was not ruled on. (Augmentation: Order dated June 4, 2008.)

On July 2, 2008, Mr. Judd filed another Motion and Affidavit in Support for Appointment of Counsel and a Response to Notice to Dismiss. (Augmentation Motion and Affidavit in Support for Appointment of Counsel filed July 2, 2008; Response to Notice to Dismiss.) In his Notice to Dismiss, Mr. Judd explained that he "had spent his entire history in [resource] classes and special education classes" and that he did not know of all of his trial counsel's failures until he met with a contract attorney in 2007. (Augmentation: Response to Notice to Dismiss.)

The district court issued an Order denying Mr. Judd's motion for appointment of counsel and dismissing Mr. Judd's petition with prejudice, stating Mr. Judd's petition was not timely filed. (Augmentation: Order dated July 2, 2008 dismissing post-conviction petition.) Mr. Judd now appeals this dismissal.

ISSUE

Did the district court err when it failed to rule on Mr. Judd's motion for appointment of counsel prior to dismissing his post-conviction petition?

ARGUMENT

I.

The District Court Erred When It Failed To Rule On Mr. Judd's Motion For Appointment Of Counsel Prior To Dismissing Mr. Judd's Post-Conviction Petition

A. Introduction

Prior to dismissing a post-conviction petition, the court must rule on a defendant's request for appointment of counsel and appoint counsel if the petitioner is needy and the *pro se* petition raises the possibility of a valid claim. In this case, the district court erred when it failed to rule on Mr. Judd's motion for appointment of counsel prior to dismissing his petition.

B. The District Court Erred When It Denied Mr. Judd's Petition For Post-Conviction Relief Without First Ruling On His Motion For Appointment Of Counsel

Idaho Courts have held that when the appointment of counsel is requested in a post-conviction case, the district court must rule on this request before deciding the substantive issues in the case. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004) (quoting *Fox v. State*, 129 Idaho 881, 934 P.2d 947 (Ct. App. 1997)). In post-conviction proceedings, a needy petitioner is entitled to court-appointed counsel if the petitioner "alleges facts showing the possibility of a valid claim." *Swader v. State*, 143 Idaho 651, 653, 152 P.3d 12, 14 (2007). See also *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111. Furthermore, when applying this standard to *pro se* applicants, the district court should "keep in mind that petitions and affidavits filed by a *pro se* petitioner will often be conclusory and incomplete." *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111.

In *Charboneau*, the Court found that the district court abused its discretion when it failed to specifically address the petitioner's request for counsel before dealing with the substantive issues in the petition. *Id.* The Court stated that, "[a]t a minimum, the trial court must carefully consider the request for counsel, before reaching a decision on the substantive merits of the petition." *Id.* at 794, 102 P.3d at 1113. The Court also found that in making this determination, the district court should consider the typical problems of *pro se* pleadings, such as the fact the pleadings will often be conclusory and incomplete because the petitioner may not know the essential elements of a claim. *Id.* at 792-793, 102 P.3d at 1111-1112 (citing *Brown v. State*, 135 Idaho 676, 23 P.3d 138 (2001)).

This policy behind requiring the court to first determine if counsel is warranted before ruling on the post-conviction petition is two-fold. First, it gives the petitioner notice of the reasons why counsel might not be appointed and an opportunity to respond. *Charboneau*, 140 Idaho at 793-94, 102 P.3d at 1112-13. Second, it allows the petitioner to have the benefit of counsel when it is needed most, to respond to either the State's motion for summary disposition or the district court's notice of intent to dismiss. *Id.*

In this case, Mr. Judd received neither of the benefits because the district court did not rule on his motion until it dismissed his petition. Mr. Judd first filed his Motion for Appointment of Counsel when he filed his Petition for Post-Conviction Relief. (See R., pp.23-26.) The district court initially dismissed Mr. Judd's petition without ruling on his motion. (R., pp.28-29.) Notably, counsel was then appointed to assist Mr. Judd on his appeal. (R., pp.39-42.) When the case was remanded to the district court, it issued a

Notice of Intent to Dismiss without ruling on the motion and even noted at the subsequent hearing, where only the State was present, that it had not appointed counsel. (Tr.5/5/08, p.8, Ls.4-13; Augmentation: Notice of Intent to Dismiss.) When the district court extended Mr. Judd's time to file his response to its Notice of Intent to Dismiss, the district court again did not rule on Mr. Judd's motion for appointment of counsel. (Augmentation: Order filed June 4, 2008.) Finally, Mr. Judd filed another motion for appointment of counsel with his Response to Notice to Dismiss, which was not addressed by the district court until it dismissed his motion. (Augmentation: Order filed July 2, 2008.) Furthermore, in his Response to the district court's Notice of Intent to Dismiss, Mr. Judd provided further support for appointment of counsel, noting that he had been in resource and special education classes his entire life. (Augmentation: Response to Notice to Dismiss.) He also explained that he was not even aware of his trial counsel's failures or that he could file a post-conviction petition until he met with a contract attorney in 2007, demonstrating his lack of knowledge with the legal system. (Augmentation: Response to Notice to Dismiss.)

At a minimum, the district court was required to carefully consider and address Mr. Judd's request for counsel prior to ruling on the substantive merits of the petition. *See Charboneau*, 140 Idaho at 794, 102 P.3d at 1113. Here, the district court never considered Mr. Judd's request for counsel prior to issuing its Notice of Intent to Dismiss or prior to initially dismissing his petition. (R. 34153, pp.38-51; 58-59.) The motion was not ruled on until the district court dismissed Mr. Judd's petition on July 2, 2008. (Augmentation: Order filed July 2, 2008.) Therefore, the district court erred when it

failed to address Mr. Judd's Motion for Appointment of Counsel before it ruled on the substantive merits of his petition.

CONCLUSION

Mr. Judd respectfully requests that this Court vacate the Order dismissing his post-conviction petition and remand his case to the district court for further consideration of his Motion for Appointment of Counsel prior to dismissing his petition.

DATED this 2nd day of October, 2008.


HEATHER M. CARLSON
Deputy State Appellate Public Defender


CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of October, 2008, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOHN A JUDD
INMATE # 55640
NFCF
1605 E MAIN
SAYRE OK 73662

PETER D MCDERMOTT
BINGHAM COUNTY DISTRICT COURT
PO BOX 4131
POCATELLO ID 83205

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720 0010
Hand deliver to Attorney General's mailbox at Supreme Court



HEATHER R. CRAWFORD
Administrative Assistant

HMC/hrc